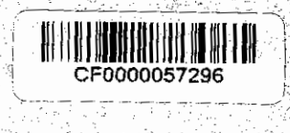

(2)

Division Bench (Crim.

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

CRIMINAL APPEAL NO. 821 OF 1989.

APPELLANT :- Rajesh Pandey son of Ramabhilas Pandey, aged about 16 20 years, (20 years as per Judgment), resident of Kacheda Pacheda, P.S. Mahasamund, tahsil Mahasamud, district Raipur.

6583 (21 all)

31-8-89 BN Pandey

Versus

RESPONDENT :- The State of M.P. through D.M., Raipur.

~~XXPXXXXXXXXXXX~~

CRIMINAL APPEAL UNDER SECTION 374 OF THE CODE OF CRIMINAL PROCEDURE.

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(17)

आदेश पत्रक

मामला क्रमांक Cr.App. 821/89 सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DB: HON'BLE MR. L.C.BHADOO,
& HON'BLE MR. DILIP RAOSAHEB DESHMUKH, JJ

21.6.2005

Ms. Deepali Pandey, counsel for the appellant.

Mr. Ashish Shukla, Govt. Advocate for the State.

Oral.

Accused/appellant Rajesh Pandey has preferred this criminal appeal under Section 374(2) of the Cr.P.C. being aggrieved by the judgment of conviction and sentence dated 31.07.1989 passed by learned 1st Additional Sessions Judge, Raipur in S.T.No.80/87 whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of murder of Samaru Sidhar convicted him under Section 302 of Indian Penal Code and sentenced him to undergo imprisonment for life.

Briefly stated prosecution case is that on 29.9.1986 at about 11.40 a.m. Baldu s/o Jailal, who is the uncle of deceased Samaru, gave the merg intimation (Ex.P-18) at the Police Station Mahasamund to the effect that his nephew namely Samaru Sidhar, aged about 11 years, who was working with Dwarka Daga, yesterday left the house at about 7.00 a.m. and thereafter, he had not returned to take his meal and since then his whereabouts are not known. Enquiries were made from the villagers and even a search was made but he could not be traced out. Today, we again made a search and Sukhram, who is my son-in-law, saw the dead body of Samaru. Injuries were present on the stomach of Samaru and it appears that injuries have been inflicted by a knife.

(पीछे देखिये)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(18)

आदेश पत्रक

मामला क्रमांक .....821/89... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Thereafter, just after five minutes of this merg intimation said Baldau again gave a First Information Report (Ex.P-7) to the Police Station in which he mentioned that his nephew Samaru was working with Dwarkadas Daga and on 28.9.1986 at about 7.00 a.m. he left the house for his working place but he had not returned to take his meal, therefore, a search was made but Samaru could not be traced out. Today, again we made a search and a dead body was seen by Sukhram in the forest area and it was also seen that some injuries were present on the stomach & hands of Samaru which appears to be caused by a knife and there was one cloth around the neck of Samaru. On enquiry from the villagers, it was came to the knowledge that at abut 9.30 a.m. Rajesh Pandey, who is the present accused/appellant, was carrying Samaru on his bicycle, this fact was seen by Jhadiram. Bishru Satnami informed that one lady namely Rajim Kumharin, who is the resident of Pacheda, saw one boy crying *'save-save'*, one bicycle was standing near the culvert and Samaru has been murdered. On receiving this report a Case No.284/86 under Section 302 of the IPC was registered under Ex.P-7 and the Investigating Officer took up the investigation. A knife was recovered at the instance of the accused/appellant from the canal, a site plan (Ex.P-8) was prepared by the Patwari namely Shri Laxminath Yadu (PW-7) about the place of incident and presence of Rajim Bai (PW-6) from where she saw the incident. The Investigating Officer took into possession the bicycle from PW-2. The dead body was sent for postmortem, Dr. K.Vinay Kumar

(पीछे देखिये)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(19)

आदेश पत्रक

मामला क्रमांक ……82.1/89…… **सन्** **200**

…… विरुद्ध ……

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

(PW-10) conducted postmortem and prepared the post mortem report Ex.P-11. After completion of the investigation charge sheet was filed against the accused/appellant in the Court of Judicial Magistrate First Class, who committed the case to the Court of learned Sessions Judge, Raipur from where learned 1st Additional Sessions Judge, Raipur Camp Court at Mahasamund received the case.

Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor, counsel for the accused/appellant and after perusal of the record was prima-facie of the opinion that offence under Section 302 of the I.P.C. is made out, therefore, he framed the charge. The prosecution in order to prove the offence against the accused/appellant examined as many as 14 witnesses. The statement of accused/appellant was recorded under Section 313 of the Cr.P.C. by the trial court in which he simply denied the evidence of prosecution witnesses and stated that he is innocent and has been falsely implicated and the witnesses have stated against him as per the wishes of the police. After hearing the arguments of counsel for the parties, learned Additional Sessions Judge convicted and sentenced the accused/appellant in the manner mentioned aforesaid.

We have heard learned counsel for the accused/appellant and learned Govt. Advocate for the State Mr. Ashish Shukla.

Learned counsel for the accused/appellant argued that the conviction is primarily based on the evidence of eyewitness namely Rajim Bai (PW-6) & Jhadiram (PW-5), who saw the deceased with

(पीछे देखिये)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(20)

आदेश पत्रक

मामला क्रमांक ..... 821/87 ... **सन्** **200**

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the accused/appellant while he was carrying the deceased on bicycle before the occurrence. She argued that PW-6 has clearly stated in her evidence that she was not able to identify the accused and the deceased. Similarly, the evidence of PW-5 is also unreliable and conviction cannot be based on the evidence of the said witness. She further argued that the knife was recovered from the open place and moreover, there is no serologist's report about the blood found on the knife, as such accused/appellant cannot be connected with the murder of deceased Samaru merely on the basis of recovery of knife.

On the other hand, learned Government Advocate supported the judgment of the trial Court.

Having heard learned counsel for the parties, we have perused the judgment of trial court and evidence available on record.

As far as the evidence of PW-6 Rajim Bai is concerned, in examination-in-chief she has stated that two years before at about 9 to 10 a.m. when she was going to the forest for the purpose of collecting woods she saw that in Nawadih one person was assaulting a boy with a knife but she could not identify the person who was assaulting the boy. She has further stated that on the same day she was summoned by the police at Nawadih and on being asked by the police she identified the person who assaulted the boy, however, she was not knowing the name of that person because that person was resident of some other village. In the cross-examination she has categorically stated that bushes were

(पीछे देखिये)

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ....821/81.... **सन्** **200**

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

-5-

standing at the place where the person was assaulting the boy. She has further stated that at the place of incident she could not identify the person who was assaulting the boy, for the reason that incident took place behind the bushes. She also could not identify the boy to whom the person was assaulting. She does not know the accused/appellant and even she does not know the name of that person because he is the resident of some other village. On that day, the police called me in the Nawadih school and informed that the child who was murdered was of the village Nawadih and thereafter, accused/appellant was shown to her by police and police informed her that he is the person who had murdered the boy that is why she is identifying the accused/appellant. She has further sated that before that day she had not seen the accused/appellant, had the accused/appellant was not shown to her by the police she could not have identified him today. In view of this evidence the accused/appellant cannot be held guilty for committing the murder of deceased Samaru. Rajiom Bai (PW-6) has categorically stated that she did not know the boy and the accused/appellant and even she could not see the boy and the accused when the crime was being committed, as the same was being committed behind the bushes. Further she has stated that the accused/appellant was shown to her by the police in the Nawadih School. In the circumstances, the evidence of this witness is wholly unreliable and conviction cannot be based on the evidence of this witness. Apart from that, witnessing the incident by this witness is ruled out from the fact that site plan (Ex.P-8)

(पीछे देखिये)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(22)

आदेश पत्रक

मामला क्रमांक ....821/87.... **सन्** **200**

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

prepared by the Patwari in which the presence of this lady has been shown at Sr. No.3, whereas the place of occurrence has been shown at Sr. No.1 and the distance between the two has been shown to be 110 ft. Even as per the evidence of Patwari- Tilakram Yadu (PW-7), who prepared the site plan, in which he has stated that the place from where the dead body was recovered there was a forest of bushes in around 10 acres and the forest was so dense therefore, it was not possible to see beyond 8 to 10 feet, whereas in the map prepared by Patwari (Ex.P-8) the distance between the place from where the lady said to have witnessed the crime and place of incident has been shown 110 ft, therefore, on this ground also evidence of PW-6 Rajim Bai is of no help to the prosecution and the conviction cannot be rest on the basis of the above evidence.

Now coming to the question of last seen of the deceased with the accused/appellant. To this effect, PW-5 Jhadiram has been examined as a witness by the prosecution, he has stated in his evidence that deceased Samaru was known to him, two years before the date of his evidence when he was working in the canal at about 9 to 10 a.m. he saw that the accused/appellant Rajesh was carrying Samaru on a bicycle towards the forest. He saw that Samaru was sitting in front of the accused/appellant on the cycle and on seeing the accused/appellant he wished the accused/appellant. In the cross-examination this witness has stated that when he was going towards the canal Birju was not along with him and he denied the police statement (DW-2). He has

(पीछे देखिये)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ...8211/87..... **सन्** **200**

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

denied the police statement that he saw that accused was going towards Phoolwari and stated that Phoolwari is on the eastern side, whereas accused/appellant was taking the deceased on Pacheda Gram side which is on the southern side, he was summoned at about 12 noon on the day when the accused/appellant was carrying Samaru on bicycle towards Pacheda which falls on the southern side. Therefore, there is lot of contradiction between the court's evidence and statement made before the police. Apart from that, this fact also makes the evidence of this person doubtful that as per his evidence before the Court he had not disclosed to anyone regarding seeing the accused/appellant carrying Samaru towards forest area then how the police came to know about this person that he saw the accused carrying Samaru. As per the law laid down by the Hon'ble Apex Court in the matter of **Bodhraj @ Bodha and others Vs State of Jammu & Kashmir** reported in **(2002) 8 SCC 45** in which the Hon'ble Apex Court has held that *'last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased was found dead is also small and possibility of any person other than the accused being the author of the crime becomes impossible. It has further been held that it would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together'*. Similarly, in the matter of **Subhash Chand Vs. State of Rajasthan** reported in **(2002) 1 SCC 702** the Hon'ble Apex Court

(पीछे देखिये)

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित —8—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

has specifically held that '*last seen together must be near about the date and time of the incident*'.

In the light of above judgments, if we see the evidence of Jhadiram (PW-5) which is not a clinching evidence and his evidence does not inspire the confidence of the Court, for the reason that the evidence given before the court is in contradiction of the statement made by him before the police and the fact that how this witness came to the notice of the police is also not clear from the evidence. It is also settled law that the last seen theory is a weak type of evidence and conclusion of guilt on the basis of such last seen evidence should not be based without corroboration by other material evidence looking to the facts and circumstances of the case.

Apart from this fact, if we look into the merg intimation report (Ex.P-18) given at 11.40 a.m. on 29.9.1986 and also the FIR (Ex.P-7) which was given just after five minutes of Ex.P-18 in which it has been mentioned that on enquiry from the villagers it was informed that at about 9.30 a.m. accused Rajesh Pandey was carrying Samaru on bicycle and it was seen by Jhadiram, but this fact has not been mentioned in Ex.P-18 which was given just 5 minutes before the report (Ex.P-7) and as per evidence of Jhadiram that he had not disclosed the fact of seeing accused/appellant and deceased together to anyone then how Baldau came to know about this fact that Jhadiram saw the accused/appellant carrying the deceased. Similarly, a mention has been made in Ex.P-7 about the information given by Bishru Satnami that Rajim Bai heard the

(पी.पी. तिवारी)

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ……S21/87… **सन्** **200**

…… **विरुद्ध** ……

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

cries of a boy uttering '*save-save*', whereas, this fact also does not find place in the report Ex.P-18 which was given just five minutes before the report (Ex.P-7). Therefore, this fact also makes the prosecution case doubtful.

Now coming to the question of recovery of knife at the instance of the accused/appellant. In the first instance, the recovery has been made from an open place, even otherwise the accused/appellant cannot be connected with the murder of Samaru on the basis of this recovery, for the reason that there is no serologist's report regarding the human blood found on the knife or that the blood group found on the knife tallies with the blood group of the deceased. Therefore, in the absence of such a report it is unsafe to connect the accused/appellant with the murder of deceased merely on the basis of the recovery.

In the last, learned Government Advocate Mr. Shukla argued that injuries were found on the body of the accused/appellant, therefore, this fact connects the accused/appellant with the murder of Samaru. An explanation about the injuries has been given by the accused/appellant that he received these injuries in an accident, but even otherwise there is no evidence on record which connects the accused/appellant with the murder of Samaru then how merely on the basis of these injuries the accused/appellant can be connected with the crime. Mr. Shukla further argued that PW-2- Durgeshdhar Sharma has stated in his evidence that Bishru had taken the bicycle from him in the name of the accused/appellant. In the cross-examination this witness

(पीछे देखिये)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(26)

आदेश पत्रक

मामला क्रमांक ....831/89..... **सन्** **200**

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

has stated that the accused used to take cycle daily from him but there is no evidence on record which goes to show that the cycle which is said to be taken by the accused/appellant was found at the scene of occurrence. As such in the absence of such an evidence we failed to understand that how the taking of bicycle of accused/appellant from this witness connects the accused/appellant with the murder of Samaru.

For the foregoing reasons, we are unable to sustain the finding of the trial court, as the same is not based on any legal and clinching evidence. Therefore, we have to reverse the finding of the trial court.

In the result, the appeal succeeds and the same is allowed. The conviction and sentence awarded to accused/appellant Rajesh Pandey are hereby set aside and he is acquitted of the charge of Section 302 of the Indian Penal Code. The bail bonds executed in pursuance of the Court's order dated 22.9.1989 stand cancelled.

Certified copy as per rules.

Sd/-
L.C.BHADOO
Judge

Sd/-
Dilip Raosaheb
Deshmukh
Judge

Roshan/-

YOGENDRA SINGH KANWAR

Digitally signed by YOGENDRA SINGH KANWAR
Date: 2025.02.20 15:15:14 +0530

(पीछे देखिये)